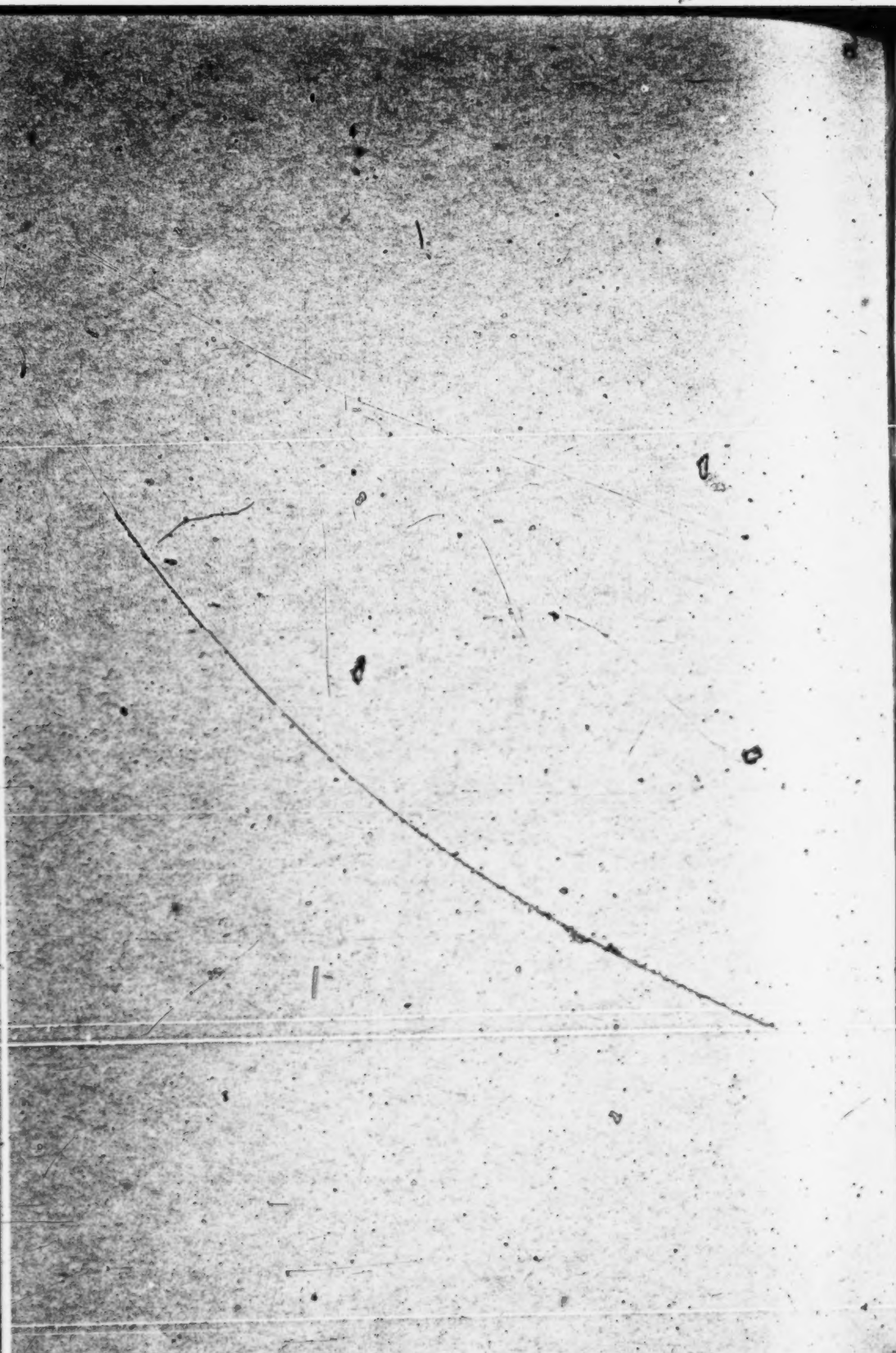

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. [redacted] 89

LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE, APPELLANT,

vs.

OSSIE McCRAY.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

JOSEPH M. HILL,
HENRY L. FITZHUGH,
Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 994

LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE, APPELLANT,

vs.

OSSIE McCRAY.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS.

STATEMENT IN OPPOSITION TO JURISDICTION AS PERMITTED BY RULE 12 AND MOTION TO DISMISS OR AFFIRM.

The policy here was an Arkansas contract, not a Tennessee contract.

The question at issue on the merits was whether a suicide clause in the policy precluding recovery except for premiums paid if suicide occurred within one

year from date of the policy ran from the date of the policy itself or ran from the reinstatement of the policy made under the terms of the policy.

The petitioner contends and cites the case of *The Insurance Company* v. *Galbraith*, 115 Tenn. 477, that where a policy lapses and is reinstated it becomes a new contract, and its date thereafter should be considered as the date of reinstatement, and that this interpretation of the policy became part of the policy to the same extent as if written therein, and it is stated that the appeal is based on the proposition, among others, that it was impairing the obligation of a contract, for the Supreme Court of Arkansas to hold in interpreting the contract that the suicide clause ran from the date of the original policy, and not from the date of the reinstatement, and the third assignment of errors is to this effect.

This contention is in conflict with the agreed statement of facts upon which the case was tried in the Circuit Court and in the Supreme Court of Arkansas.

Paragraph 1 of the Agreed Statement of Facts has this statement:

> "The policy was delivered in Fort Smith, Arkansas, to Jonas McCray after the date of said policy and while the said Jonas McCray was in good health, and that the first premium on said policy was paid at the date of its delivery. That said policy of insurance is an Arkansas contract."

Counsel are in error in stating that the three cases decided by the Supreme Court of Arkansas cited by them, to-wit:

New York Life Insurance Co. v. *Adams*, 151 Ark. 123; *Security Life Ins. Co.* v. *Leeper*, 171 Ark. 77, *Equitable Life* v. *King*, 178 Ark. 283, did not decide this precise question.

On the contrary the effect of those three decisions is that under the terms of such policy as the one at bar, the reinstatement provided therein, when effected, reinstated the original policy and the suicide clause therein ran from the date of the original policy. Thus in the *Leeper* case the court in 171 Ark. 77 at pp. 79 80 said:

> "The only provision in the policy now before us with respect to suicide related to the period running from the date of the original policy, and, since the policy gave an absolute right of reinstatement upon terms which did not include a new contract with reference to suicide, appellant had no right to impose that additional feature upon the assured in procuring reinstatement. The trial court was correct therefore in holding that the company was originally liable under the policy, notwithstanding the stipulation in the application."

A consideration of these cases which are cited in the opinion necessarily led the court to the following conclusion in the instant case:

> "There is no room for the contention that any new or different contract or policy was in force after reinstatement. By agreement between the parties, a forfeiture of the policy was set aside and the same contract was reinstated. No new policy was issued and none contemplated. By the express terms of the policy, it

> is provided that, 'If within one year from the date of issue of this policy, the insured shall * * * die by his own hand, the liability of the company shall be limited to the amount of the premiums paid hereon.' It does not provide that the company's liability shall be thus limited if the insured shall die by his own hand within one year from the date of reinstatement, should the policy lapse. Time is to be reckoned 'from the date of issue of this policy,' not from the date of reinstatement, nor from the date of any other policy. No doubt appellant could have so worded its policy, but it has not seen fit to do so."

Moreover, this question of impairing the obligation of the contract was not presented in the pleading in the trial court, or in the Supreme Court of Arkansas.

The Validity of Section 6155 of Crawford and Moses' Digest.

The validity of this section was not raised in the answer of the insurance company, but after trial and judgment, and a motion for a new trial on the merits, a supplemental motion for a new trial was presented to the circuit court raising the question of the constitutionality of Section 6155 of Crawford & Moses' Digest.

Section 3071 of the Statutes of Texas of 1895 reads as follows:

> "In all cases where a loss occurs, and the life or health insurance company liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor,

> such company shall be liable to pay the holder of such policy, in addition to the amount of the loss, 12 per cent damages on the amount of such loss, together with all reasonable attorney's fees for the prosecution and collection of such loss."

This Court on May 5, 1902, sustained this statute upon the ground that the State may, as a condition of doing business within the State, impose on insurance companies obligation to pay damages and attorney's fees in case of default in the payment of their policy, and that the equal protection of the law is not denied by this statute imposing these penalties upon life and health companies, although the obligation is not imposed upon other classes of insurance companies.

Fidelity Mutual Life Assn. v. *Mettler*, 185 U. S. 308. In this case Justices Harlan and Brown dissented on the ground that this statute was only made applicable to two classes of life insurance companies and not to all doing a similar business.

This decision was approved in *Iowa Life Ins. Co.* v. *Lewis*, 187 U. S. 335, and *Home Life Ins. Co.* v. *Fisher*, 188 U. S. 726. This subject again came before this Court in 1903 in a similar statute from Nebraska, which was attacked on the ground that the statute was in violation of the Fourteenth Amendment, and the statute in that case was also sustained. *Farmers & Merchants Ins. Co.* v. *Dobney*, 189 U. S. 301.

This was the state of the law on March 29th, 1905, when the Arkansas Legislature passed an act which is now 6155 of Crawford & Moses' Digest, which act was in the exact words of the Texas statute construed

in the Mettler case, except the Arkansas statute added fire and accident insurance companies to the life and health companies provided in the Texas statute.

This statute was attacked before the Supreme Court of Arkansas in *Arkansas Insurance Co.* v. *McManus*, 86 Ark. 115.

The opinion of the court was written April 20th, 1908, by the then Mr. Justice McCulloch, later the Chief Justice, and still later the Chairman of the Federal Trade Commission.

This learned justice in his opinion reviewed the Mettler, Dobney and other cases in this Court, and also decisions of State courts on similar statutes. After reviewing the decisions of this Court on the subject, he stated that those decisions settled beyond doubt the question that the statute is not in conflict with the Federal Constitution, and that not being violative of "Equal protection of the law" and of "the due process of law" provisions of the Federal Constitution, it was difficult to see how any provision of the Constitution of the State, which in effect affords the same protection, could be violated.

In concluding the discussion, the opinion states:

> "These statutes are correctly based upon the theory that insurance companies, after loss occurs, have the insured at a great disadvantage, and are in position to inflict great damage by mere delay in payment of losses. Therefore it is neither unjust nor unreasonable to inflict a penalty which will in some degree compensate for that injury where the resisted claim is finally adjudged to be just, and which will also tend to deter the company liable from interposing unnecessary delay in settlement."

In *People of Sioux County* v. *National Surety Co.*, 276 U. S. 238, this Court reversed the Circuit Court of Appeals of the Eighth Circuit which affirmed a Nebraska case against said insurance company, but declined to enforce the Nebraska statute allowing attorneys' fees in the event of recovery, and stated: "State statutes allowing the recovery of attorneys' fees in special classes of actions have been upheld as constitutional by this Court," citing the Dobney and Mettler cases and quite a number of others, and stated:

> "In these cases the local statutes were in effect treated as creating a statutory liability in which insurers, by accepting risks after their enactment, had acquiesced, and for the liability thus assumed a remedy was available in the Federal as well as in the State Courts."

As seen, this statute was passed in 1905, and its constitutionality sustained in 1908. Therefore, every insurance company doing business in Arkansas since 1908, have in doing so, acquiesced in this act as creating statutory liability, for they accepted risks and received payments therefor in Arkansas; and the liability is thus assumed by them as a remedy available in the Federal as well as in the State Courts.

The appellant insists that it in good faith defended the suit, and to penalize it for so doing is to take its property without due process. It seeks thereby to sustain a will o' the wisp—its good faith—instead of the statute, but its good faith we question.

It argues here that its policy was a Tennessee contract, yet stipulated facts which made it an Arkansas

contract, and expressly agreed that it was an Arkansas contract, and now seeks in this Court another interpretation thereof, contrary to its own stipulation. Furthermore, still contending that it was a Tennessee contract and that the obligation thereof was impaired by this statute inflicting attorneys' fees and penalty for not paying its obligations in Arkansas when this statute had been in existence and sustained for many years prior to its doing its business in Arkansas.

Then it contends that the Arkansas Supreme Court has not passed on the question on the merits, that is, whether the limitation on the suicide clause ran from the date of the policy or the date of the reinstatement, yet shows itself familiar with the three Arkansas cases, all of which decide this question against it in principle, and one of them on exactly the same facts.

No Federal question was then raised on the merits of the issue for trial and only after it lost in the circuit court, it raised this question in a supplemental motion for a new trial as to constitutionality of statute for attorneys' fees and penalty.

In this record it is submitted that the conduct of the petitioner is such that even accepting the construction of this statute given by the Circuit Court of the Eighth Circuit, which the Arkansas Supreme Court has refused to follow, that that court would permit recovery of attorneys' fees and penalty, especially as the petitioner sought and has obtained a supersedeas not only of the $200.00 attorneys' fees and $60.00 penalty, but also of the $500.00 judgment on the policy.

A statement of these facts, it is submitted, indicates it is seeking not justice, but delay. However its good faith, if it possessed it, is immaterial.

The only case from this Court which it cites in support of its attack of the constitutionality of Section 6155 of Crawford & Moses' Digest is Supreme Ruling of *Fraternal Mystic Circle* v. *Snyder*, 227 U. S. 497.

Snyder, in 1887, bought a policy of life insurance payable to his wife as beneficiary. He died in 1908, and in a suit by the beneficiary against the company the trial court added 25 per cent penalty, pursuant to the statute of Tennessee, passed in 1901, authorizing such penalty where refusal to pay was not in good faith. The sole issue presented was whether this statute of 1901 impaired the obligation of the contract made in 1887, and the court held that it did not.

The company argued that many cases decided by this Court sustaining statutes for attorneys' fees and penalty where the insurance companies failed to pay on demand, and recovery was had for the full amount were sustained against the attack grounded on the 14th Amendment and was applied to cases arising after the statutes were enacted and sought to differentiate this case as without the many decisions of this court sustaining those statutes. The opinion cites many such cases, among others, the Mettler and Dobney cases.

It is apparent that this case does not in the remotest degree sustain the attack on the constitutionality of this statute passed in 1905, over 20 years before this policy was written, and many years after this company did business in Arkansas, with full knowledge of this

statute of the State, which had been sustained by its court.

Motion to Affirm or Dismiss.

The judgment should be affirmed and the penalty indicated in Rule 30, paragraph 2, applied. There is a difference in the cases as to whether the motion to affirm or motion to dismiss would be applicable under the facts appearing here, but as Rule 7, Paragraph 4 permits such motion in the alternative, that course is adopted and this motion made in that form.

Whether there was a federal question as to the validity of section 6155 of Crawford & Moses' Digest prior to 1902 when the similar Texas statute was held a proper exercise of State authority by this court, and not offensive to the federal Constitution is immaterial, because that decision and many others decided since and prior to bringing of this suit, in which this court has held statutes similar to the one at bar immune from attack under the due process, or any other clause of the federal Constitution, the raising of it again does not now present a federal question.

In Equitable Life Assurance Society v. *Brown*, 187 U. S. 308, the court said:

> "From the analysis just made, it results that although a Federal Question was raised below in a formal manner, that question, when examined with reference to the averments of fact upon which it was made to depend, is one which has been so explicitly decided by this court as to foreclose further argument on the subject, and hence to cause the Federal question relied upon to be devoid of any substantial foundation

> or merit. This being so, the case is brought directly within the rule announced in *New Orleans Waterworks Co.* v. *Louisiana,* 185 U. S. 336-345."

The Louisiana case referred to was a discussion of frivolous and unsubstantial Federal questions, and this case is important as classifying as such a question one which has heretofore been directly decided by this Court. The Equitable case is applied in *Deming* v. *Carlisle Pkg. Co.,* 226 U. S. 102.

In *Consolidated Turnp. Co.* v. *Norfolk & Ocean View Ry. Co.,* 228 U. S. 598, the court said:

> "The bare claim that the judgment operated to take property of the plaintiff in error without compensation is not enough to justify this court in taking jurisdiction unless it also appears from the averments of fact upon which the claim must depend that the question is one real and substantial, and not so utterly without merit as to be frivolous, or a question concluded by previous decisions of this court," citing cases.

This case is approved and followed in *U. S. ex rel. Brown* v. *Lane,* 232 U. S. 598.

In *Williams* v. *U. S.,* 255 U. S. 336, the court said:

> "We do not pause to consider whether the constitutional validity of the Reed Amendment had been in terms so completely settled by the Clark Distilling Co. and the Hill Cases as to cause the contention here relied upon to be frivolous at the time the writ of error was sued out, but content ourselves with saying that, in

> any event, the want of merit in the constitutional question relied upon is so plainly and unequivocally established by the cases in question and the authorities which have followed them as to require us to do no more than direct attention to that condition, and consequently to affirm the judgment."

It would weary the court to pursue such cases further. It is respectfully submitted that the Federal questions sought to be reviewed are foreclosed by many decisions of this court and are frivolous and unsubstantial now, and the appeal is presented for delay and vexation and should be treated as such by affirmance with penalty or dismissal, as the court may see proper.

Respectfully submitted,

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